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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 71-26

THOMAS QUINN and GARY SEIDEN,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No. .....

THOMAS QUINN and GARY SEIDEN,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners Thomas Quinn and Gary Seiden respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on June 4, 1971.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto. An opinion was rendered by the District Court for the Southern District of New York which is unreported.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on June 4, 1971. This Petition for Certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

Question Presented

Whether this conviction must be vacated and the indictment dismissed because the government delayed more than 5 years in seeking an indictment during which period of delay 3 key defense witnesses died whose unavailability at trial irreparably prejudiced the defense.

Provisions Involved

Rule 48(b) Federal Rules of Criminal Procedure. Sixth Amendment, U. S. Constitution.

Statement of the Case

This conviction arises out of a 99 count indictment handed down in the Southern District of New York on May 28, 1968, charging conspiracy to violate and substantive violations of the Securities Laws under sections 77e(a), 77q(a), 77x, 78i(a)(2) and 78ff(a) of Title 15 and Sections 1341 and 1343 of Title 18, United States Code. In addition to Thomas Quinn and Gary Seiden the petitioners here, 8 co-defendants were named in the indictment.

At the trial more than 50 witnesses testified and great quantities of documentary exhibits were put in evidence.

Because of the volume and complexity of the evidence no effort will be made to capsulize the trial in its entirety. Reference will be made only to those parts of the record relevant to the issue raised in this petition.

In essence, the Government charged that during 1962 and 1963, Thomas Quinn, a lawyer, was the head of a brokerage firm named Thomas, Williams and Lee which traded in a security known as Kent Industries. They also charged that Gary Seiden, Thomas Quinn's brother-in-law, was a salesman with the firm with some administrative responsibilities.

With respect to the stock of Kent Industries, the government contended that there were restrictions on its tradeability which required that the stock be registered and that Thomas, Williams and Lee sold the stock unregistered. The government also charged fraud in the sale of Kent stock to the customers of Thomas, Williams and Lee because of material omissions and misrepresentations on the part of the firm's salesman in discussing the stock and the use of instruments of transportation and communication in interstate commerce and the use of the mails to perpetrate a fraud. In addition, Count One of the indictment charged a conspiracy to commit the aforementioned crimes.

The transactions which formed the subject matter of this indictment took place during 1962 and 1963 while the indictment was not returned until May 28, 1968, a delay of approximately 5 years. In the interval 3 persons died whose testimony was crucial to the defense in this trial. Witnesses' memories were dulled by the passage of time. Upon the trial a customer, Kraft, incorrectly identified David Genaro as Norman Babbit and 2 witnesses were totally unable to

identify the defendant Quinn. Another witness, Noskin, testified directly that his memory was dulled by the passage of time.

On July 15, 1963, the defendant, Quinn, appeared before the S.E.C. at their request and testified at length in connection with possible violations of the securities laws in connection with the distribution and sale of Kent Industries stock.

On or about November 8, 12 and 19, 1963 Quinn also appeared at the office of the Attorney General of the State of New York and testified about the practices of his brokerage firm in the issuance, sale and negotiation of Kent Industries stock. On November 19, 1963, the books and records of the firm were delivered to the New York Attorney General's office pursuant to a subpoena duces tecum.

On November 1, 1963, the firm of Thomas, Williams and Lee, Inc., filed a notice of withdrawal of registration as a broker dealer with the S.E.C.

On November 29, 1963, the S.E.C. instituted public proceedings pursuant to Section 15(a) and (b) of the Securities Exchange Act of 1934 on the question of what, if any, remedial action was necessary with respect to the broker-dealer registration of Thomas, Williams and Lee and its membership in the National Association of Securities Dealers and whether to permit its notice of withdrawal of registration, filed on November 1, 1963, to become effective. However, no hearing in the matter was scheduled at that time.

On June 12, 1964, Thomas, Williams and Lee, and Quinn were expelled from the National Association of Securities Dealers.

On January 11, 1965, the S.E.C. issued an order discontinuing proceedings against Thomas, Williams and Lee and permitting its notice of withdrawal from registration to become effective. On the same day it also issued an order for Public Proceedings against Quinn and others, to determine what remedial action was appropriate in the public interest pursuant to the Securities Exchange Act of 1934, Section 15(b).

In the order, it was alleged that as a result of an investigation conducted by the S.E.C.'s Division of Trading & Markets, information was obtained showing that during the period from about March 1, 1963 to October 31, 1963, Quinn and others wilfully violated the anti-fraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 in the offer and sale of the stock of Kent Industries, Inc., the same criminal conduct charged in this indictment.

A public hearing on the issues was held on March 15 through April 13, 1965 and again on May 10 and 11, 1965 before the Hon. Sidney Gross, Hearing Examiner. On January 21, 1966, the Hearing Examiner rendered his decision. He found Quinn and others guilty of fraudulent practices in the sale and distribution of Kent Industries stock and concluded that they should be barred from being associated with a broker dealer.

The Hearing Examiner's decision set forth facts substantially the same as those charged in the indictment and proved at trial. At the oral argument of this case before the Court of Appeals for the Second Circuit the Assistant United States Attorney admitted that his office was in possession of this information in 1966 and there was no reason for the further delay of more than 2 years before an indictment was sought.

During this 2 year period 3 persons died who were essential to the defense of this case: Nicholas Marotta, who had been president of Thomas, Williams and Lee and was a 25% shareholder in the brokerage firm as well as in Kent Industries; Herbert Check, the accountant for Thomas, Williams and Lee; and Michael Lekocas, a major shareholder in Kent Industries who, along with Marotta, had introduced Thomas, Williams and Lee to Kent Industries. The defense at trial was a lack of criminal knowledge and intent and these witnesses were essential to demonstrate that the petitioners acted in good faith.

The petitioners' motions to dismiss the indictment for denial of speedy trial were made and denied before trial and at the conclusion of all the evidence. The Court of Appeals affirmed.

Reasons for Granting the Writ

I

The decision below raises significant and current problems concerning the prejudice to a defendant of excessive, unnecessary pre-indictment delay.

Since *Dickey* v. *Florida*, 398 U.S. 30 (1970), significant questions have been raised concerning the scope of constitutional protection against pre-indictment delays.[1] Unnecessary pre-indictment delay occasioned by the government is potentially more harmful to a defendant than to those delays occurring after the criminal proceeding has commenced. The defendant is often unaware that the government intends to prosecute, thus no efforts are made

[1] During the past term of this Court, Certiorari was granted in *U. S.* v. *Marion*, —— U.S. —— (#810, June 8, 1970), a case involving pre-indictment.

to preserve evidence necessary for a defense. In addition, memories necessarily fade with the passage of time so that duties of reasonable diligence and prompt prosecution should be imposed on the government.

It may be answered that pre-indictment delays affect the memories of government witnesses equally so that the defendant may rely on weaknesses in the government case caused by its staleness. But the presumption of innocence and concomitant burden of proof on the government are often meaningless fictions when a defense has been made unavailable by the passage of time.

In this case, the petitioner Thomas Quinn was a young lawyer 25 years old at the time of the stock dealings in question. He had known Nicholas Marotta all his life and had been introduced to the securities business by him and learned of Kent Industries through him.

The petitioner Quinn cooperated extensively with the S.E.C. investigation from 1963-1966 believing that these were the only sanctions he faced. In its opinion the Court of Appeals concluded that because the petitioner didn't call Marotta, Check and Lekocas to testify for him at the S.E.C. proceedings, their testimony would not have supported his defense. There is no logic to this position. The petitioner did not anticipate a criminal prosecution. His defense in S.E.C. proceedings cannot be expected to equal the defense of a criminal prosecution.

At trial the defendant contended that he believed in the value of Kent Industries stock because of the way it had been presented to him and that he acted in good faith and without criminal intent. Marotta, Lekocas and Check would have aided the defendant in demonstrating the cir-

cumstances under which he was introduced to Kent Industries stock and the good faith with which he acted in trading in stock. All 3 of these witnesses died during the period 1966-1968. Contrary to the opinion of the Court of Appeals, the government conceded in oral argument that this 2 year delay was not needed for investigation and was completely unnecessary. This case raises in clear outline important question of unnecessary pre-indictment delay.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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July 6, 1971

CERTIFICATION

I hereby certify that on this 6th day of July, 1971, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Solicitor General, Department of Justice, Washington, D. C. 20530, Counsel for the Respondent. I further certify that all parties required to be served have been served.

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Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 635, 662—September Term, 1970.

(Argued January 28, 1971 Decided June 4, 1971.)

Docket Nos. 35471-72

UNITED STATES OF AMERICA,

Appellee,

—against—

THOMAS F. QUINN, DAVID GENNARO and GARY SEIDEN,

Defendants-Appellants.

Before:

WATERMAN, MOORE and FEINBERG,

Circuit Judges.

Appeal from judgments of conviction entered in the United States District Court for the Southern District of New York on July 31, 1970 after a trial before the Hon. Edward Weinfeld, *Judge* and a jury, on multiple counts charging conspiracy and stock fraud in violation of 15 U.S.C. §§77e(a), 77q(a), 77x, 78i(a)(2), 78ff(a) and 18 U.S.C. §§371, 1341, 1343.

Affirmed.

EDMUND ALLEN ROSNER, New York, N. Y., *for Defendants-Appellants Thomas Quinn and Gary Seiden.*

ROBERT KASANOF, New York, N. Y., *for Defendant-Appellant David Gennaro.*

DANIEL J. SULLIVAN, Assistant United States Attorney, New York, N. Y. (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, New York, N. Y., James W. Rayhill, Assistant United States Attorney, New York, N. Y., on the brief), *for Appellee.*

MOORE, *Circuit Judge*:

Although the indictment contained 99 counts against 10 defendants, this appeal is taken by three defendants Thomas F. Quinn (Quinn), David Gennaro (Gennaro) and Gary Seiden (Seiden) from judgments of conviction entered against them only as to a few of the counts. More specifically, Count I charged these three appellants, together with others, of conspiring to violate provisions of the Securities Act of 1933, the Securities Exchange Act of 1934 and the mail fraud statutes (15 U.S.C. §§77e(a), 77q(a), 77x, 78i(a)(2), 78ff(a) and 18 U.S.C. §§371, 1341 and 1343.[1] Counts 10, 20 and 21 charged Gennaro and

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1 15 U.S.C. §77e(a), part of the Securities Act of 1933, provides in part:

"Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means . . . in interstate commerce . . . to sell such security . . . ; or

(2) to carry or cause to be carried . . . in interstate commerce, . . . any such security for the purpose of sale or for delivery after sale."

15 U.S.C. §77q(a), also part of the Securities Act of 1933, provides in part:

Quinn with three specific fraudulent stock sales; Counts 22, 23 and 24 charged Seiden and Quinn with three such sales; and Counts 57, 78 and 79 charged Seiden, Quinn and others with selling unregistered stock in three other transactions. Only these ten counts were sent to the jury. The jury after discriminating deliberation returned their verdicts as follows:

"It shall be unlawful for any person in the offer or sale of any securities by the use of . . . interstate commerce . . . —

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money . . . by means of any untrue statement of a material fact . . . or omission to state a material fact . . . , or

(3) to engage in any transaction . . . which operates or would operate as a fraud or deceit upon the purchaser:"

15 U.S.C. §77x, also part of the Securities Act of 1933, provides in part:

"Any person who willfully violates any of the provisions of this subchapter . . . shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both."

15 U.S.C. §78i(a), part of the Securities Exchange Act of 1934, provides in part:

"It shall be unlawful for any person, . . . by the use of . . . interstate commerce . . . —

(2) to effect . . . a series of transactions in any security registered on a national securities exchange [in this case the Salt Lake City Exchange] creating actual or apparent active trading in such security, or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others."

15 U.S.C. §78ff(a), also part of the Securities Exchange Act of 1934, provides in part:

"Any person who willfully violates any provision of this chapter . . . shall be fined not more than $10,000 or imprisoned for not more than two years or both . . . ."

18 U.S.C. §371 provides in part:

"If two or more persons conspire . . . to commit any offense against the United States, . . . each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

18 U.S.C. §1341, part of the mail fraud statute, provides in part:

"Whoever, having devised or intending to devise any scheme or artifice to defraud . . . for the purpose of executing such scheme

Count 1 (conspiracy): Seiden and Quinn convicted; Gennaro acquitted.

Counts 10, 20, 21 (specific stock sales): Quinn and Gennaro convicted.

Counts 22, 23, 24 (specific stock sales): Quinn and Seiden convicted.

Counts 57, 78, 79 (sale of unregistered stock: of the appellants, only Quinn and Seiden charged): Quinn convicted; Seiden convicted on 78, 79 and acquitted on 57.

The points relied upon for reversal by the respective appellants are so specific and limited that any resume of the facts need only be stated in the light of these points. Any general statement of the highly complicated transactions, upon which the government bases its claims of fraud, would lead only to confusion. The means by which Kent stock was manipulated and sold was described by some fifty witnesses whose collective testimony was more than adequate to support the fraudulent practices charges.

Quinn and Seiden limit their claims to (1) delay in bringing the indictment during which period allegedly key witnesses had died and (2) the alleged suppression by the

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or artifice or attempting to do so . . . knowingly causes to be delivered by mail . . . any matter or thing [whatever], shall be fined not more than $1,000 or imprisoned not more than five years, or both."

18 U.S.C. §1343, also part of the mail fraud statute, provides in part:

"Whoever, having devised or intending to devise any scheme or artifice to defraud . . . transmits . . . by means of wire, radio or television communication in interstate foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice shall be fined not more than $1,000 or imprisoned not more than five years or both."

prosecutor of the fact that a main government witness, J. Samuel Garrison, had been indicted in Florida during the New York trial. They do not dispute the weight of evidence.

Gennaro adopts these points but makes as his principal argument a claim of alleged error because the trial court failed to grant his motion for acquittal on the conspiracy count at the end of the government's case. Although acquitted by the jury on this count, Gennaro argues that the evidence improperly received against him on the conspiracy count prejudiced him before the jury on the substantive counts on which he was convicted.

Pre-Indictment Delay

The convictions of the appellants were based upon their participation in the sale of stock of Kent Industries, Inc. (Kent). In 1963 the Securities and Exchange Commission (SEC) commenced an investigation of an over-the-counter broker-dealer, Thomas, Williams and Lee, Inc. (TWL) in connection with its sales of Kent stock to the public. Quinn was TWL's president, Gennaro was sales manager and a salesman, and Seiden was a salesman who also had certain accounting duties. The matter remained before the SEC until 1966. In January 1966 an SEC hearing examiner recommended that Quinn, Seiden and other TWL salesmen be barred from the securities business.

Investigation of possible criminal aspects of the Kent stock sales commenced in a government prosecutorial office in New York in the spring of 1966 and after further investigation an indictment was returned in May 1968, well within the period of the statute of limitations, the primary guarantor against pre-indictment delay. *United States* v. *Ewell,* 383 U.S. 116, 122 (1966); *United States* v. *Feinberg,* 383 F.2d 60 (2d Cir. 1967), *cert. denied,* 389 U.S. 1044

(1968). On the eve of the trial, defendants Quinn, Seiden and Parma moved to dismiss the indictment for want of a speedy trial. Although denying the motion, the trial court wisely withheld final judgment on this point and gave these defendants the opportunity to renew the motions upon the trial, thus enabling them to show prejudice from any unjustified delay. *Dickey* v. *Florida*, 398 U.S. 30, 38 (1970). The motions were renewed both upon the trial and at the time of sentencing. At these times the same trial judge had had ample opportunity, after a fairly lengthy trial and hearing the testimony of the many witnesses, to appraise the claims of prejudice. In their appellate arguments appellants rely principally on the death of three persons, Nicholas Marotta, a former president and large stockholder of TWL, Herbert Check, an accountant for TWL and Michael Lekocas, a stockholder in Kent. However, the offer of proof submitted by Quinn was directed largely to showing that in his actions he was influenced by Marotta, Lekocas and Check and that as a result of reliance "upon their representations [he] lacked any criminal intent." (Applts' Br., pp. 23-24.) In the light of the quasi-nebulous relevance of these witnesses' asserted testimony, the judgment of an experienced trial judge should be determinative as to whether the defendants were deprived of a fair trial. And parenthetically, it may be noted that neither Quinn nor Seiden thought enough of the Marotta, Lekocas, Check testimony in relation to the integrity of the Kent stock sales as to call them during the SEC investigation. The trial court's denial of the motions to dismiss because of alleged delay was proper.[2]

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[2] There is no serious challenge with respect to the post-indictment period. Defendants were indicted on May 28, 1968, motions were decided on November 8, 1968 and trial took place on June 2, 1970 after a one month delay requested by defendant Quinn. Since no demand was made during the period between indictment and trial

Alleged Suppression of Evidence

Appellants' claim that the prosecutor suppressed evidence is wholly lacking in merit as is demonstrated by the facts upon which it is based.

The government's first and according to appellants "one of its main," witnesses was J. Samuel Garrison, at one time president of Kent. The trial commenced on June 22, 1970. On June 23d, prior to Garrison's cross-examination in response to a request for criminal records of proposed government witnesses, the prosecutor (an Assistant United States Attorney for the Southern District of New York) stated that he knew that Garrison had no prior criminal convictions and that he (the Assistant) had no knowledge of any arrest record. The trial ended on July 6, 1970. On July 15, 1970 a news item appeared in the New York Times announcing that Garrison had been indicted in Florida on June 25, 1970 in connection with a $50 million dollar stock fraud. The indictment, however, had been sealed and was not made public until July 13, 1970. Calling this "newly discovered evidence" the defendants moved for a new trial. The motion was denied. Appellants do "not contend that the prosecutor knew of this indictment and wilfully failed to reveal it." Obviously, the very purpose of a "sealed" indictment is non-disclosure. However, appellants take the completely untenable position that "knowledge of any part of the government is equivalent to knowledge on the part of this prosecutor" and that "he [the New York prosecutor] must be deemed to have had constructive knowledge of this evidence" (Applts' Quinn and Seiden Br., pp. 8, 9). The Department of Justice alone has thousands of employees

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to advance the date of trial, appellants would fail in this respect even if the delay was excessive. *United States* v. *Lustman*, 258 F.2d 475, 477-8 (2d Cir.), *cert. denied*, 358 U.S. 880 (1958).

in the fifty States of the Union. Add to these many more thousands of employees of "any part of the government." Appellants' argument can be disposed of on a "reductio ad absurdum" basis. Moreover, the chronology of events refutes any knowledge of, or suppression by, the New York prosecutor of the Florida indictment. June 23 New York prosecutor's statement during trial; June 25 sealed indictment against Garrison returned in Florida; July 13 indictment unsealed in Florida; July 15 news disclosure in New York. The "suppression of evidence" cases cited by appellants[3] deal with facts known to the prosecution—not to facts concededly unknown.

Gennaro

Gennaro takes the position that it was error for the trial court to deny his motion for acquittal at the end of the government case. He must be referring to the conspiracy count only because he argues that this alleged failure prejudiced his right to a fair consideration by the jury of the substantive counts.

A detailed review of the evidence is unnecessary. The purpose of the conspiracy was the sale of Kent stock. The sale was accomplished through TWL whose moving spirit was Quinn. Gennaro was a sales manager of TWL, shared an office with Quinn and was present in the office when Quinn was discussing the merchandising of Kent stock with Kaminske[4] and cash incentives to salesmen. With Quinn

3 *United States* v. *Bonanno*, 430 F.2d 1060 (2d Cir.), *cert. denied*, 400 U.S. 964 (1970); *United States* v. *Polisi*, 416 F.2d 573 (2d Cir. 1969); *United States* v. *Miller*, 411 F.2d 825 (2d Cir. 1969); *Kyle* v. *United States*, 297 F.2d 507 (2d Cir. 1961); *United States* v. *Consolidated Laundries*, 291 F.2d 563 (2d Cir. 1961).

4 Of course, it was not hearsay for Kaminske to testify that he had a conversation with Quinn relating to the conspiracy in the presence of this "blond" man. See *United States* v. *Geaney*, 417 F.2d 1116, 1120, n. 3 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970).

he fixed artificial prices for the stock and gave "pep" talks to salesmen concerning Kent stock. He knew of other questionable promotional operations and himself made sales. Three witnesses testified that they had purchased Kent stock through Gennaro. Both his representations and non-disclosures support the jury's conclusions on the substantive counts against him.

Even if Gennaro did not know that he and TWL were selling unregistered Kent stock and that there was manipulation therein on the Salt Lake Stock Exchange, knowledge of all phases of a conspiracy is not required. *United States v. Crosby,* 294 F.2d 928 (2d Cir. 1961), *cert. denied* 368 U.S. 984 (1962).

Lengthy argument was made by Gennaro's counsel at the close of the government's case upon motions for judgment of acquittal on Counts 1, 10, 20 and 21 and to strike all alleged hearsay admitted subject to connection. The trial judge was thus faced with the problem presented in every multi-defendant criminal trial in which there is a conspiracy count. Of necessity testimony introduced against one defendant is bound to affect every other defendant. The human mind is not so compartmentalized as to be able to segregate the testimony and apply it only to a particular defendant as might a computer. The solution might be found in the abolition of all multi-defendant trials and conspiracy counts. It is significant that despite the constant recurrence of the problem, the courts and the legislatures have not adopted any such drastic changes. As long as the jury is to protect the rights and liberties of persons charged with crime, the method of jury instruction and the presumption that the jury will follow the court's instructions must remain as a safeguard that they will weigh the evidence as to each defendant and as to each count. Here

there is rather tangible evidence that the jury functioned in a highly selective and carefully discriminatory manner. Gennaro was acquitted of conspiracy and convicted on the sales counts. The evidence was clearly sufficient as to the substantive counts and this, quite apart from any "spill-over" effect of evidence against the others. Quinn and Seiden do not challenge the sufficiency of the proof as to the conspiracy or the substantive counts against them. And Seiden was acquitted on count 57 but Quinn was convicted thereon.

Gennaro's argument is, in substance, that he should have been acquitted by the court instead of by the jury. At the close of the government's case occurred the following colloquy:

> "The Court: I want to ask Mr. Kasanof [Gennaro's counsel] how about without regard to a particular defendant, as to whether or not the overall evidence presented is sufficient to go to the jury on the conspiracy?
>
> "Mr. Kasanof: Yes, sir, I believe it is. I would not say otherwise to your Honor."

The problem facing the trial judge at this point was discussed at length in *United States* v. *Geaney,* 417 F.2d 1116 (2d Cir. 1969), *cert. denied,* 397 U.S. 1028 (1970). We have tried to comply with the standards set forth in *Geaney* and have every reason to believe that the trial judge found that there was sufficient independent evidence before him to justify the submission of Count 1 to the jury as to Gennaro.

Judgments affirmed.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourth day of June, one thousand nine hundred and seventy-one.

Present:

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. WILFRED FEINBERG,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

THOMAS F. QUINN, *et al.*,

Defendants,

THOMAS F. QUINN, GARY SEIDEN,
DAVID GENNARO,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-26

THOMAS QUINN AND GARY SEIDEN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners Quinn and Seiden and eight co-defendants were indicted on 99 counts charging conspiracy to violate and substantive violations of the Federal Securities Laws and the mail fraud statutes (15 U.S.C. 77e(a), 77q(a), 77x, 78i(a)(2), 78ff(a) and 18 U.S.C. 1341 and 1343). Petitioners were both convicted on Count 1 (conspiracy); Quinn was convicted on Counts 10 and 20 through 24 (specific stock sales) and on Counts 57, 78, and 79 (sales of unregistered stock); and Seiden was convicted on Counts 22, 23, 24, 78 and 79, and acquitted on Count

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57. Quinn was given concurrent sentences of two years, execution of which was suspended on all but six months, and he was placed on probation for one year. Seiden was given concurrent sentences of one year, execution of which was suspended on all but two months. The court of appeals affirmed (Pet. App 11–22).

The charges against petitioners arose out of the sale of stock of Kent Industries, Inc. (Kent), during 1962 and 1963. Quinn, an attorney, was the president of an over-the-counter broker-dealer, Thomas, Williams and Lee, Inc. (TWL), during this period. Seiden was a salesman with TWL, and also had certain accounting duties. The government's evidence showed that the Kent stock was required to be registered before trading, and that petitioners participated in sales of unregistered Kent stock and made fraudulent misrepresentations in connection therewith. (Pet. App. 12–15.)

Petitioners' only contention here is that preindictment delay entitled them to have the indictment dismissed. The Securities and Exchange Commission began an investigation of TWL's sales of Kent stock in 1963, and continued its examination until 1966. Though a Commission hearing examiner recommended in January, 1966, that Quinn, Seiden and other TWL salesmen be barred from the securities business, the Commission did not refer the case for criminal prosecution. In the spring of 1966 the United States Attorney initiated an independent investigation concerning possible criminal violations. The indictment against

petitioners was returned on May 28, 1968, after that investigation was completed. Petitioners were tried and convicted in June 1970.[1] Prior to the trial, they moved to dismiss the indictment on the ground that they had been improperly denied their constitutional right to a prompt trial. The district court denied this motion (*United States* v. *Quinn,* 314 F. Supp. 233 (S.D. N.Y.)), as well as similar motions at the trial and at the time of sentencing.

While the question whether preindictment delay may require dismissal of the indictment is before this Court in *United States* v. *Marion,* No. 70–19, this Term, there is no need to withhold action on this petition pending a decision in that case because, contrary to petitioners' claim, they were not prejudiced by the delay.[2] They assert that the delay deprived them of important exculpatory testimony of three witnesses, all of whom died before trial. The government showed that this assertion was groundless, and the district court agreed in the following language (314 F. Supp. at 234):

> The defendant Quinn asserts that the pre-indictment delay has deprived him of the testimony of three individuals [redacted] of whom died in July, 1966, and the other two in 1967. Despite

[1] Petitioners do not assert improper *post*-indictment delay, as indeed they could not on the record in this case. Motions were decided by the district court approximately five months after indictment (on November 8, 1968), and the trial began on June 22, 1970, following a one month delay requested by Quinn.

[2] See our briefs in opposition in *Heard* v. *United States,* No. 71–21, O.T. 1971, and *Kroll* and *Cala* v. *United States,* Nos. 1314 and 1435, O.T. 1970, certiorari denied, May 3, 1971.

> the fact that two were named as co-conspirators, he asserts that all three would have offered exculpatory evidence upon a trial. Other than Quinn's bare assertion, no evidential matter supports the claim. To the contrary, it appears that one, in the course of an official inquiry into Kent transactions, invoked his constitutional privilege against self-incrimination and another, in a civil proceeding, denied under oath having had any conversation with anyone about the stock. Moreover, even under the defendant's version, the alleged representations and assurances made to him by the deceased witnesses in regard to Kent Industries, Inc. were accompanied by or related to public reports, financial statements, balance sheets and other documentary material which should still be available for use by the defendants upon the trial in the event the government does not introduce them. * * *

The court of appeals also pointed out that the testimony that these witnesses purportedly would have given was of "quasi-nebulous relevance", and that "neither Quinn nor Seiden thought enough of the Marotta, Lekocas, Check [the three witnesses] testimony in relation to integrity of the Kent stock sales as to call them during the SEC investigation" (Pet. App. 16).

We should add that here the prosecutor did not postpone action he otherwise could have taken, and accordingly there was no "delay" in seeking the indictment against petitioners. The information gathered by the Securities and Exchange Commission

did not result in the criminal charges against petitioners, or even a Commission reference for prosecution. Instead, the United States Attorney made a further careful investigation and only after that was completed could he determine "the need for and extent of criminal charges to be brought" against petitioners as a result of their activities involving "wide-ranging securities distribution schemes." *United States* v. *Parrott*, 425 F. 2d 972, 975 (C.A. 2), certiorari denied, 400 U.S. 824. The indictment was returned promptly following that investigation.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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